No. 34528-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA V. FOWLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

BRIEF OF APPELLANT

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A. INTRODUCTION

Joshua Fowler was driving with his girlfriend, Haley Lloyd, who had an outstanding warrant for her arrest. When she spotted Sergeant Vigesaa following behind them, she told Mr. Fowler to "go."

Mr. Fowler increased his speed for about four to five blocks. He then pulled into the parking lot of an apartment complex, stopped the vehicle, and fled on foot. He quickly surrendered, but was charged with attempting to elude a police vehicle.

At trial, the "to convict" instruction for attempting to elude a police vehicle erroneously instructed the jury that Mr. Fowler drove in a "manner indicating a reckless manner." This error relieved the prosecution of its burden to prove beyond a reasonable doubt that Mr. Fowler in fact drove in a reckless manner. And despite the lack of evidence indicating reckless driving, Sergeant Vigesaa repeatedly testified that Mr. Fowler eluded him and drove recklessly. The erroneous jury instruction and the officer's opinion testimony that invaded the province of the jury deprived Mr. Fowler of a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court provided an erroneous "to convict" instruction that relieved the prosecution of its burden to prove every element beyond a reasonable doubt.

2. The trial court impermissibly allowed police officer testimony on the ultimate issue of fact that invaded the province of the jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused's right to fair trial is violated when the instructions do not accurately state the law. And due process requires that the "to convict" instruction contain all the elements of the offense. Were Mr. Fowler's right to a jury trial and due process violated by the trial court's misstatement of the law in the "to convict" instruction that relieved the prosecution of having to prove every element beyond a reasonable doubt?

2. The accused is deprived of his constitutional right to a jury trial when a witness opines on his guilt. Was Mr. Fowler's constitutional right to a jury trial violated by repeated police officer testimony that he eluded police and drove recklessly?

D. STATEMENT OF THE CASE

Joshua Fowler was driving with his girlfriend, Haley Lloyd, when Sergeant Vigesaa drove by the vehicle and recognized Mr. Fowler, who he suspected of driving with a suspended license. RP 130. The officer also

recognized Ms. Lloyd, who he knew had a felony warrant. RP 130. Sergeant Vigesaa did a U-turn to follow the vehicle. RP 130. When Ms. Lloyd spotted police behind them, she told Mr. Fowler to "go." RP 226.

Mr. Fowler sped away from the officer for about four to five blocks before turning into an apartment complex parking lot, where he stopped the car. RP 133, 134, 142, 226. Mr. Fowler and Ms. Lloyd both jumped out of the vehicle and ran away on foot. RP 144, 226.

Sergeant Vigesaa ran after Mr. Fowler until Mr. Fowler stopped. RP 146, 226, 227. Sergeant Vigesaa then retraced their path. He found a gun and ammunition in the bushes. RP 149.

Mr. Fowler was charged with attempting to elude a police vehicle, second degree unlawful possession of a firearm, and possession of a stolen firearm. CP 10-11.

At trial, Mr. Fowler admitted that he sped away from police and fled on foot, but denied the gun or ammunition were his. RP 226, 228. Sergeant Vigesaa claimed that he pursued Mr. Fowler with flashing lights and siren in a marked police vehicle, and that Mr. Fowler did not reduce his speed through controlled intersections. RP 133-137. Sergeant Vigesaa estimated that Mr. Fowler drove about 45 miles per hour through a 25 mile per hour residential neighborhood, though this was an estimated average

based on him looking down at his speedometer while following Mr. Fowler. RP 133-134, 140.

The jury acquitted Mr. Fowler of possessing a stolen firearm, but found him guilty of attempting to elude a police officer and unlawful possession of a firearm. CP 110-112.

E. ARGUMENT

1. The trial court provided an erroneous "to convict" instruction that relieved the prosecution of its burden to prove beyond a reasonable doubt that Mr. Fowler drove in a reckless manner while attempting to elude a police vehicle.

a. The "to convict" instruction for attempting to elude a police vehicle misstated the element of the offense "drove in a reckless manner."

To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (citing *State v. Mills,* 154 Wn.2d 1, 7, 109 P.3d 415 (2005); U.S. Const. amend. XIV, VI; Const. art I, § 22.

Due process requires that "to convict" instruction contain all of the elements of the offense. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002) ("The purpose of requiring all of the elements to be contained in

the 'to convict' instruction is to protect the due process rights of criminal defendants.").

RCW 46.61.024 (1) makes it a class C felony for a person to willfully fail or refuse to immediately bring his vehicle to a stop "and who **drives** his or her vehicle **in a reckless manner** while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop." (Emphasis added).

Accordingly, the Information alleged that Mr. Fowler "…**did drive** his vehicle **in a reckless manner** while attempting to elude a pursuing police vehicle…" (Emphasis added). CP 10. The "to convict" instruction however, erroneously instructed that Mr. Fowler "**drove** his vehicle in a **manner indicating a reckless manner."** (Emphasis added). CP 95.

This error no doubt derived from the 2003 changes to RCW 46.61.024(1), when the legislature replaced the phrase, "manner indicating a wanton or willful disregard for the lives or property of others" with "reckless manner." *State v. Ratliff*, 140 Wn. App. 12, 14, 164 P.3d 516 (2007) (citing Laws of 2003, ch. 101, § 1).

Previous to the 2003 change in the statute, the Supreme Court considered whether a manner *indicating* a wanton and willful disregard meant that the person *actually* drove wantonly and willfully. *State v. Sherman* 98 Wn.2d 53, 57, 653 P.2d 612 (1982).

The court found that the word "indicating" in the statute conveys "both an objective and subjective component." *Id.* at 58. "Indicating" may show that conduct was exhibited, but does not require that the accused in fact possessed the requisite mental state in every case. For example, someone having a seizure while driving may exhibit wanton and willful disregard, but would not have the requisite mental state: "[w]hile his manner of driving would indicate wanton and willful disregard, the defendant would not actually have wanton and willful disregard for others." *Sherman*, 98 Wn.2d at 59.

Because conduct that "indicates" a mental state does not in fact establish a mental state, the Court ruled that "indicating" created a "rebuttable presumption" of a wanton or willful mental state based on objectively observed conduct: "Circumstantial evidence may 'indicate' a wanton and willful disregard, but the defendant may rebut that inference from circumstantial evidence." *Id.*

Sherman thus directed trial courts to instruct the jury that circumstantial evidence of a defendant's driving created a rebuttable inference that the defendant had "wanton and willful disregard." *State v. Aamold*, 60 Wn. App. 175, 180, 803 P.2d 20 (1991) (citing *Sherman*, 98 Wn.2d at 58-59).

Like in *Sherman,* the jury in Mr. Fowler's case was instructed to find that he drove in a manner that merely *indicated* a reckless manner. CP 95. This Instruction required a finding as to objective conduct, but not necessarily Mr. Fowler's subjective mental state. *See Sherman*, 98 Wn.2d at 59. The erroneous "to convict" instruction thus did not require the State to prove that Mr. Fowler possessed the mental state of driving in a "reckless manner."

b. The erroneous "to convict" instruction relieved the prosecution of proving beyond a reasonable doubt that Mr. Fowler drove in a reckless manner.

Because the erroneous "to convict" instruction did not require the State to prove that Mr. Fowler in fact had the mental state of driving in a "reckless manner," the State was relieved of it of its burden to prove each element of the offense beyond a reasonable doubt.

"It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt." *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). A jury instruction requires reversal if it relieves the State of its burden to prove every element of a crime. *Id.*

Though jury instructions that relieve the state of its burden may be subject to harmless error analysis, the "to convict" instruction, enjoys a special status. *State v. Pope*, 100 Wn. App. 624, 630, 999 P.2d 51 (2000).

This is because "[a] to-convict instruction… serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence." *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (citing *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)) "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Smith*, 131 Wn.2d at 263 (citing *State v. Johnson,* 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). Thus, even in cases where the error may seem "picayune," "the jury has the right…to regard the 'to convict' instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand." *Smith*, 131 Wn.2d at 263.

A "clear misstatement of the law" in a jury instruction is presumed to be prejudicial. *State v. Wanrow,* 88 Wn.2d 221, 239, 559 P.2d 548 (1977). A "to convict" instruction that misstates an element of the offense is not harmless error unless the court is convinced, beyond a reasonable doubt, that the error did not contribute to the verdict. *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States,* 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). An instructional error may be of constitutional magnitude if it relieves the state of its burden of proof. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010)

(emphasis added) (to determine whether the instruction was an error of constitutional magnitude, the court examines "whether the instruction omitted an element **so as to relieve the State of its burden** or merely failed to further define one of those elements.").

Here, the erroneous "to convict" instruction misstated the law, relieving the prosecution of having to prove beyond a reasonable doubt that Mr. Fowler in fact drove in a reckless manner.

Because there was scant evidence that Mr. Fowler possessed the requisite mental state of driving in a reckless manner, this error affected the jury verdict. Though Mr. Fowler admitted speeding away from police, his testimony at trial did not establish that he possessed the mental state of recklessness. Mr. Fowler testified that he paid attention to the road ahead of him. RP 225. He did not believe that people were in the area he traveled. RP 226. He drove only four to five blocks before stopping his vehicle in an apartment complex parking lot and running away on foot. RP 226. And though he admitted speeding, this is not enough to establish "a reckless manner." RP 237; *See State v. Randhawa,* 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (the inferred fact of reckless driving did not flow from the evidence of speed alone.). Like in *Randhawa,* Sergeant Vigesaa estimated that Mr. Fowler drove only about 20 miles above the speed limit, which does not necessarily support the inference that a person drove

in a reckless manner. *Randhawa*, 133 Wn.2d at 77–78 (traveling 10 to 20 m.p.h. over the posted speed limit "is not so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences.").

And though Sergeant Vigesaa described Mr. Fowler's driving as "reckless," Mr. Fowler presented a competing description of the danger posed by his speeding for a very short distance. RP 137, 143, 225-226. Because of the divergent testimony and Sergeant Vigesaa's very limited observation of Mr. Fowler's driving, it cannot be argued that the erroneous "to convict" instruction which relieved the State of proving Mr. Fowler in fact drove in a reckless manner did not affect the jury's verdict.

Reversal is thus required where this error was of constitutional magnitude and affected the jury verdict.

2. Sergeant Vigesaa impermissibly testified to the ultimate issue of fact, that Mr. Fowler drove recklessly in an attempt to elude police.

Sergeant Vigesaa's repeated testimony that Mr. Fowler drove recklessly while attempting to elude police invaded the province of the jury and thus deprived Mr. Fowler of his jury trial right.

Opinion testimony regarding a defendant's guilt is reversible error if the testimony violates the defendant's constitutional right to a jury trial. This includes the independent determination of the facts by the jury. *State*

v. King, 167 Wn.2d 324, 329–30, 219 P.3d 642 (2009) (citing *State v. Kirkman*, 159 Wn.2d 918, 938, 155 P.3d 125 (2007); U.S. Const. amend. VI; Const. art. 1 § 21. An explicit or almost explicit witness statement on an ultimate issue of fact results in manifest constitutional error. *Kirkman,* 159 Wn.2d at 938.

Opinion testimony regarding the guilt or veracity of the accused is prejudicial "because it 'invades the exclusive province of the jury.'" *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley,* 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987))). Thus, neither a lay nor an expert witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *King,* 167 Wn.2d at 331 (citing *Black,* 109 Wn.2d at 348).

To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) "the other evidence before the trier of fact." *King*, 167 Wn.2d at 332–33 (citing *Kirkman*, 159 Wn.2d at 928 (quoting *Demery,* 144 Wn.2d at 759)).

A law enforcement officer's opinion testimony may be especially prejudicial because the "officer's testimony often carries a special aura of reliability." *King*, 167 Wn.2d at 331 (citing *Kirkman,* 159 Wn.2d at 928).

Opinion testimony that is manifest constitutional error can be raised for the first time on appeal where there is actual prejudice that affects the accused's trial right, which includes the independent determination of the facts by the jury. *King*, 167 Wn.2d at 329-330 (citing *Kirkman,* 159 Wn.2d at 926-927); RAP 2.5(a)(3).

Such was the case here where Sergeant Vigesaa offered repeated, conclusive legal opinion that Mr. Fowler eluded police by driving recklessly:

> Q: And what happened after you made that U-turn?
> A. The defendant immediately began **eluding** me, accelerated away from me.

RP 130 (emphasis added). Then again: "he immediately tries to **elude** me." RP 133. In response to the prosecution's request to more specifically describe Mr. Fowler's driving Sergeant Vigesaa opined:

> A. Well, he was attempting to **elude** me. He was driving **recklessly** at speeds almost twice the speed limit[...]
> I've been doing this job for almost 25 years. ...his behavior was to drive faster, **recklessly**, and try to get away from me.

RP 137. And despite the fact that the Sergeant Vigesaa provided few specifics about the apartment building's parking lot, he concluded that

people were endangered "due to the **reckless behavior** of the defendant." RP 143.

Sergeant Vigesaa's opinion testimony that Mr. Fowler committed the elements of the offense was manifest constitutional error under the factors set out in *King*. First, his status as an officer carries an "aura of reliability" that gives undue credence to the officer's repeated, overt legal conclusions that Mr. Fowler "eluded" and drove "recklessly." *King*, 167 Wn.2d at 331. This impermissible opinion testimony overshadowed the otherwise scant evidence of reckless driving.

The State offered no other witnesses to testify about Mr. Fowler's driving. Mr. Fowler admitted to driving away from police, but drove only four to five blocks, saw no people around, and the officer's speed estimations were neither precise nor inordinately high. RP 134, 226, 237. Thus, it was for the jury to decide whether Mr. Fowler's conduct established that he "eluded" police by driving in a "reckless manner" as required by RCW 46.61.024 (1).

This impermissible opinion testimony invaded the province of the jury and thus requires reversal.

F. CONCLUSION

Mr. Fowler's conviction for attempting to elude a police vehicle requires reversal where the erroneous "to convict" instruction relieved the

prosecution of having to prove beyond a reasonable doubt that Mr. Fowler drove in a reckless manner. Reversal is also required where Mr. Fowler was deprived of his right to a jury trial by the officer's repeated testimony that Mr. Fowler committed the elements of the offense.

DATED this 21st day of June, 2017.

Respectfully submitted,

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	)	
v.	)	NO. 34528-9-III
	)	
JOSHUA FOWLER,	)	
	)	
APPELLANT.	)	

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